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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

PRESSLEY L. HILLIARD; ESTATE OF CARL HILLIARD BY LUELLA HILLIARD, Executrix; RUTH R. BOOKSER and EDWARD F. BOOKSER, husband and wife,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA, Acting by and through the PENNSYLVANIA GAME COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The petitioners, Pressley L. Hilliard; Estate of Carl Hilliard by Luella Hilliard, Executrix; Ruth R. Bookser and Edward F. Bookser, husband and wife, pray that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the Commonwealth of Pennsylvania dated April 28, 1972, denying a Petition for Leave to Appeal from the Opinion and judgment of the Commonwealth Court of Pennsylvania in an Eminent Domain case.

Opinions Below

The denial of the Petition to appeal to the Supreme Court of the Commonwealth of Pennsylvania is unreported but simply denied the right without Opinion (Exhibit M, Pg. 65a).

The Opinion of the Commonwealth Court of Pennsylvania and dissenting Opinion are reported in Pa. Cmlth. Ct. ; 284 A. 2d 326, and appear in Exhibit K, Pages 39a-51a.

The former Opinion by the Common Pleas Court of Butler County is unreported and appears in Exhibit J, Pages 34a-38a.

The Opinion of the United States District Court for the Western District of Pennsylvania, after finding substantial Constitutional questions, dismissed on the grounds of *res adjudicata*. This Opinion is reported in 308 F. S. 756, which was affirmed by the U. S. Court of Appeals (Third Circuit) on entirely different grounds, holding a Federal Court could not enjoin a State Court under 28 USC 2283, reported in 438 F. 2d 92.

The Appendix contains all proceedings and Opinions of the Common Pleas Court of Butler County, Pennsylvania.

Jurisdiction

1. The date of dismissal of the Petition for Leave to Appeal to the Supreme Court of the Commonwealth of Pennsylvania was April 28, 1972.

2. The jurisdiction of this Court is involved under 28 USC 1257(3).

Questions Presented

The Petitioners filed Preliminary Objections to the Declaration of Taking in Eminent Domain. The Court refused one Preliminary Objection, sustained another, dismissed the Declaration with leave to amend and left undisposed the other Preliminary Objections (Preliminary Objections, Ex. A, Pages 1a-3a) (Opinion, Exhibit B, Pages 4a-7a).

Upon an Amended Declaration of Taking being filed, Preliminary Objections were filed renewing those undisposed of originally and raising additional Constitutional questions (Exhibits D & E, Pages 9a-14a). These were dismissed (Exhibit F, Pg. 15a-19a) because they were not filed in the original group, which dismissal was affirmed by the Supreme Court of the Commonwealth of Pennsylvania in a *Per Curiam* Opinion reported in 433 Pa. 599; 249 A. 2d 536, and rehearing denied.

A Petition was presented requesting the trial Court to dispose of the undisposed of Preliminary Objections raising the question of the power and right to condemn. This Petition was refused and the Opinion and Order appear as Exhibit I, Pages 25a-33a (the Petition) and Exhibit J, Pages 34a-38a (Opinion).

An appeal was taken to the Commonwealth Court of Pennsylvania, which affirmed with a dissenting Opinion in which two Judges concurred. This appears in Exhibit K, Pages 39a-51a.

The questions, therefore, arising are:

1. Where condemnees are denied the right to contest the "power and right" of condemnor to condemn, in accordance with the Pennsylvania Eminent Domain Code,

does this present such a Constitutional question under the State and Federal Constitutions, as to due process and equal rights, that condemnees are entitled to invoke the judgment of the Supreme Court of the United States?

2. Did the State Courts' procedure preclude the condemnees a reasonable opportunity to have issues as to claimed rights heard and determined by the State Courts?

Statutory and Constitutional Provisions Involved

STATUTORY

26 P. S. 1-406

"(a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof. * * *

"(c) All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent. * * *

"(e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. * * * If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The Court may allow amendment or direct the filing of a more specific declaration of taking."

26 P. S. 1-515

"Any party aggrieved by the decision of the viewers may appeal to the court of common pleas within thirty days from the filing of the report. The appeal shall raise all objections of law or fact to the viewers' report."

26 P. S. 1-517

"All objections, other than to the amount of the award, raised by the appeal shall be determined by the court preliminarily."

PENNSYLVANIA CONSTITUTIONAL PROVISIONS

Article I, Section 9

"Nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

Article I, Section 10

"Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

CONSTITUTION OF UNITED STATES

Amendment, Article V

"* * * No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment, Article XIV, Section 1

"No State * * * shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Statement of Facts

Under the Pennsylvania Eminent Domain Code of 1964, the exclusive method of challenging the power and right to condemn was by Preliminary Objections.

The original Preliminary Objections did this by the Sixth Objection which to this day has never been disposed of by the Court (Exhibit A, Page 3a).

Without disposing of this Preliminary Objection, the Court dismissed the Declaration of Taking unless an amendment was filed thereto, which was done curing the objections which the Court had sustained.

To the Amended Declaration, a new set of Preliminary Objections were filed, raising again the undisposed of Preliminary Objections originally filed and certain other Constitutional questions. These were not sworn to however, but upon procuring the affidavit of the parties, a motion was presented asking leave to file the second set of Objections *nunc pro tunc,* which was granted by the Court in accordance with Section (e) of the Code (26 P. S. 1-106(e), Exhibit E, Pages 11a-14a.

The Court dismissed these Preliminary Objections, Exhibit F, Pages 15a-19a, by clearly stating he was dismissing the Objections filed April 4, 1968 and the *nunc pro tunc* filing of April 17, 1968, on the basis that the Eminent Domain Code required all Preliminary Objections to be filed at one time (26 P. S. 1-406(e)). This was done even though an Amendment to the Declaration had been filed taking an additional estate, to-wit, all minerals.

On an appeal to the Supreme Court of the Commonwealth of Pennsylvania this was affirmed *Per Curiam* (433 Pa 599; 249 A. 2d 536).

Petitioners contend this decision is *res adjudicata* with respect to the right of petitioners to file a second set of Preliminary Objections to the Amended Declaration and that it does not affect the original Preliminary Objections never disposed of by the Court. The respondents contend the decision is *res adjudicata* of the right to be heard on the first Preliminary Objections. An examination of the lower Court's Order (Exhiit F, Pages 15a-19a) clearly shows that only the Preliminary Objections filed April 4, 1968 and *nunc pro tunc* Objections filed April 17, 1968 were ruled upon.

The petitioners then applied for relief to the United States District Court for the Western District of Pennsylvania and after testimony, the Court found substantial Constitutional questions had been raised but the proceedings were dismissed on the theory the matter was *res adjudicata* on the appeal from the second set of Preliminary Objections (308 F. S. 756).

The Appellate Court (Third Circuit) affirmed on the authority of 28 USC 2283, holding that an injunction could not issue against a State Court.

In the meantime, the petitioners were forced before a Board of Viewers and the damages fixed for the three properties at $215,400.00.

Under the Pennsylvania Eminent Domain Code, an appeal was taken from the award of Viewers to the Common Pleas Court raising questions of law and fact (26 P. S. 1-515). This Code requires questions of law to be disposed of before submitting damages to a jury (26 P. S. 1-517).

A Petition was then presented requesting the Court to take testimony on the original Preliminary Objections which had never been disposed of by any Court. This was refused. An appeal was taken to the Commonwealth Court of Pennsylvania which affirmed the lower Court. Two Judges joined in a dissenting Opinion (284 A. 2d 326), (Opinion, Exhibit K, Pages 46a-51a) and (Dissenting Opinion, Exhibit K, Pages 39a-45a), which points out that the original Preliminary Objections had not been disposed of and the dismissal of the Second Preliminary Objections was not *res adjudicata*. The only exception allowed by the Court was on the point that even though the Declaration was amended, there was no right to file Preliminary Objections to an Amended Declaration because the Code required all Objections to be filed at one time.

The Petitioners then petitioned (Exhibit L, Pages 52a-64a) to have the Supreme Court of the Commonwealth of Pennsylvania hear the case, which was denied April 28, 1972 (Exhibit M, Pg. 65a) from which this Petition is now made.

In substance, through no fault of the petitioners, their Preliminary Objections raising the question of the power and right to condemn have never been heard and determined by any Court and they are faced with an Order of Ouster notwithstanding the Pennsylvania Eminent Domain Code requiring all Preliminary Objections to be disposed of by the Court.

The Petitioners have been denied their Constitutional right of due process and equal rights contrary to the Constitution of the State and the Federal Constitution.

Reasons for Granting the Writ

The Pennsylvania Eminent Domain Code made Preliminary Objections the exclusive means of challenging the "power and right" to condemn. It also placed a duty on the Court to dispose of all Preliminary Objections raising such a question (26 P. S. 1-406). Because this is part of the State's due process, the failure to follow the Act of Assembly by holding a hearing and disposing of all Preliminary Objections is a break down in the State's due process and, hence becomes a Federal question under the Fourteenth Amendment.

The judgment of the Court below was an arbitrary and capricious exercise of power and in clear conflict with the fundamental principles which have been established and the protection and enforcement of private rights and was a denial of due process of law.

The Court below never acted upon certain Preliminary Objections in an eminent domain case and upon condemnees' application for the Court to act, it refused to permit the condemnees to take testimony on the Preliminary Objections raised under the Eminent Domain Act.

The idea of procedural due process is reflected in the statement that it is a Rule as old as the law that no one shall be personally bound until he had a day in Court by which is meant until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation or opportunity lacks all the attributes of a judicial determination; it is a judicial usurpation and oppression and can never be upheld where justice is fairly administered.

Snyder vs. Massachusetts, 291 U. S. 97; 54 S. Ct. 330;

Constitutional Law, 16 Am. Jur. 2d Sec. 548 p. 942.

The right to be heard must necessarily embody the right to file Motions and pleadings essential to present claims and raise relevant issues.

L. W. Holt vs. Commonwealth of Virginia, 381 U. S. 131; 85 S. Ct. 1375.

Daniel Webster in the *Dartmouth College* case, 4 Wheat. (U. S.) 518, defined due process as meaning:

> "A law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. "

In the case of *McGuire vs. Sadler,* 337 F. 2d 902, the Court said in determining certain procedural improprieties before the Commissioner had deprived the plaintiff of a fair opportunity to protect his property. On Page 906 it was stated:

> "If such procedural shortcomings are found to have existed and if indeed they deprived the plaintiff of a fair and adequate hearing, these findings would seem sufficient for a showing of a Fourteenth Amendment violation."

Inasmuch as both Federal and State Constitutions protect all persons from being deprived of their property without due process of law and warrant the equal protection of the law, proceedings to condemn must be such as not to violate these constitutional guarantees.

Dohany vs. Rogers, 281 U. S. 362; 50 S. Ct. 299.

The due process clause protects the land owner from the adoption of any form of procedure which deprives him of reasonable opportunity to be heard and to present such objections and claims as he is entitled to make.

Due process based upon Sections 9 and 10 of Article I of the Pennsylvania Constitution and like provisions in the Fifth and Fourteenth Amendments to the Federal Constitution under our Eminent Domain Code of 1964 requires an opportunity to present testimony and be heard and when the Courts fail in this, the condemnees are deprived of due process of law.

Londoner vs. City and County of Denver, 210 U. S. 373, 385; 28 S. Ct. 708;
Mullane vs. Central Hanover Bank, 339 U. S. 306, 70 S. Ct. 652 at 657.

In *Shelley vs. Kramer,* 334 U. S. 1; 68 S. Ct. 836, in dealing with the Federal question of due process and equal protection, the Court said:

> "That the action of State Courts and judicial officers in their official capacity is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. * * * Amendment Fourteen makes void 'State action of every kind' which is inconsistent with the guarantee therein contained and extends the manifestation of 'state authority' in the shape of laws, customs, or judicial or executive proceedings. * * *
>
> "Where the action of a state clearly violates the terms of the Federal Constitution, it is the duty of the Supreme Court of the United States so to declare."

The case of *Henry vs. State of Mississippi,* 379 U. S. 443; 85 S. Ct. 564, held that when, by procedural default, one is barred in a defense, the Supreme Court of the United States has consistently held that the question of when and how default in compliance with State procedural rules can preclude this Court's consideration of a Federal question is itself a Federal question and quoted from *Lovell vs. City of Griffin,* 303 U. S. 444; 58 S. Ct. 666 as follows:

> "When, as here, there is a plain assertion of Federal rights in the lower Court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail * * *. Whether the right denied or not was given due recognition by the State Court is a question as to which the petitioners are entitled to invoke our judgment."

The above case quoted from the case of *Love vs. Griffith*, 266 U. S. 32; 45 S. Ct. 12 as follows:

> "When as here there is a plain assertion of Federal rights in the lower Court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail. Davis vs. Wechsler, 263 U. S. 22; 44 S. Ct. 13. Whether the right was denied or not given due recognition by the Court of Civil Appeals is a question as to which the plaintiffs are entitled to invoke our judgment. Ward vs. Love Co., 253 U. S. 17; 40 S. Ct. 419".

Whether the procedure followed by a State Court affords a defendant sufficient opportunity to claim Federal rights depends on whether he had a reasonable opportunity to have the issue heard and determined by the State Court.

> *Michel vs. State of Louisiana*, 350 U. S. 91; 76 S. Ct. 158.

In the case of *Staub vs. City of Baxley*, 355 U. S. 313; 78 S. Ct. 277, it was pointed out where a defense was grounded on a Constitutional question, the Supreme Court must determine for itself the sufficiency of the allegations displaying the right of defense and it was not concluded by the view taken by the State Court.

The record in this case clearly shows that the original Objection No. 6 was never disposed of by any Court and that the decision of the State Supreme Court only affirmed *Per Curiam* what the lower Court had decided, which was that no second set of Preliminary Objections could be

filed under the Eminent Domain Code of the Commonwealth of Pennsylvania, even though the condemnor had amended and taken an additional estate. This is the most that the affirmation of the lower Court by the Supreme Court of Pennsylvania could hold.

The failure to file Preliminary Objections under the Eminent Domain Code constitutes a waiver of the right to do so but in this case the petitioners filed a challenge of the power and right to condemn. They filed a second set of Objections with leave of Court, and when forced before the Viewers, they took an appeal raising questions of law as the Code permitted them to do. These issues were to be preliminarily determined by the Court before the jury considered the damages, but this was denied by the lower Court and affirmed on appeal by the Commonwealth Court of Pennsylvania. The dissenting Opinion of the Commonwealth Court pointed out very graphically that the original Preliminary Objections had not been disposed of and, hence, the parties have not had their day in Court (Exhibit K, Pages 39a-51a).

A Petition was presented to the Supreme Court of the Commonwealth of Pennsylvania requesting leave to appeal but, without Opinion, that Court denied this Petition.

This Petition to the United States Supreme Court is presented in the last effort to effect the petitioners' right under the Fourteenth Amendment to the Federal Constitution. By the procedural inadequacies, contrary to the Eminent Domain Code of the Commonwealth of Pennsylvania, the petitioners' original Preliminary Objections raising the right and power to condemn these properties where properties were never disposed of and consequently they have been denied their Constitutional rights, both State and Federal.

Conclusions

For these reasons a Writ of Certiorari should issue to review the dismissal of the Petition to Appeal to the Supreme Court of Pennsylvania or in lieu thereof, the trial court could be directed, after hearing, to dispose of the Preliminary Objections raising the power and right to condemn and in the meantime the Writ of Ouster be stayed.

Respectfully submitted,

LEE C. McCANDLESS,
FRANK P. KRIZNER,
McCANDLESS, CHEW & KRIZNER,
Attorneys for Petitioners.

APPENDIX

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II.

Date Filed	Designation	Exhibit No.	Page
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(Opinions in attempted injunction proceedings in United States District Court for the Western District of Pennsylvania, reported in 308 Fed. Supp. 756 and on appeal to the Circuit Court reported in 438 Fed. 2d 92.)

EXHIBIT A

Preliminary Objections to Declaration of Taking

Filed November 21, 1967.

IN THE
COURT OF COMMON PLEAS
OF BUTLER CO., PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA Acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

PRESSLEY L. HILLARD.

No. 232 Sept. Term, 1967.

The condemnee, Pressley L. Hilliard, by his attorney, Lee C. McCandless, files the following Preliminary Objections to the Declaration of Taking:

I

Paragraph 3 of the Declaration of Taking recites a Resolution of the Pennsylvania Game Commission at a meeting thereof held June 2, 1967, but fails to attach a copy of the same.

II

Paragraph 5 sets forth the purpose is to provide open space land for conservation and propagation of game and recreational purposes.

Exhibit A—Preliminary Objections to Taking.

III

Paragraph 7 states: "The nature of the title or interest hereby appropriated and acquired by the Condemnor is the surface only of the land hereinbefore described and of each and every part thereof, excepting the outstanding estates or interests in the minerals (including oil and gas) in, on and underlying the same with the mining rights as heretofore reserved or conveyed in prior deeds of record, if any, and subject to the rights-of-way of public roads, if any, which may now exist upon said land or any part thereof and any rights-of-way of any public utility company now in actual use upon said land or any part thereof, if any."

IV

The condemnee's land is underlaid with valuable deposits of oil, gas, coal and limestone and has a two story frame house, barn, garage with an apartment and the language of the condemnor in the above paragraph together with the purpose of taking is so indefinite, vague and uncertain that the rights of the parties cannot be clearly defined.

V

By the language of said condemnor, it cannot be determined what the rights of the condemnee are to explore for oil or gas or remove their deposits of coal and limestone or whether the condemnor is taking the building or not, because of which it is impossible to determine the damage or to frame an issue as testimony will not be based upon the same conception of the rights of the parties.

Exhibit A—Preliminary Objections to Taking

VI

The Declaration fails to show the standards for acquisition under Project 70 Land Acquisition and Borrowing Act have been complied with (72 P. S. 3946.18).

VII

The Declaration of Taking was supposed to be filed September 5, 1967 and no service was had on the defendant until on or about November 1, 1967, all of which is contrary to the Eminent Domain Act.

WHEREFORE, showing the above matters Pressley Hilliard moves that the Declaration of Taking be struck from the record.

LEE C. McCANDLESS,
Attorney for Pressley Hilliard.

EXHIBIT B

Opinion

Filed February 14, 1968.

IN THE
COURT OF COMMON PLEAS
OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA Acting by and through the PENNSYLVANIA GAME COMMISSION,
vs.
PRESSLEY L. HILLIARD.

A. D. #232 Sept. Term, 1967,
Book 90, Page 307.

COMMONWEALTH OF PENNSYLVANIA Acting by and through the PENNSYLVANIA GAME COMMISSION,
vs.
CARL HILLIARD.

A. D. #233 Sept. Term, 1967,
Book 90, Page 308.

COMMONWEALTH OF PENNSYLVANIA Acting by and through the PENNSYLVANIA GAME COMMISSION,
vs.
RUTH R. BOOKSER and EDWARD F. BOOKSER, her husband.

A. D. #234 Sept. Term, 1967,
Book 90, Page 309.

Robert J. Stock for Condemnor;
Lee C. McCandless for Condemnees.

Exhibit B—Opinion & Order Dismissing Declaration.

These cases are before the Court on Preliminary Objections to the Declaration of Taking. In each case the same objections are raised, with one exception. In the Pressley L. Hilliard case the condemnee contends that the Declaration of Taking should be invalidated because the Commonwealth did not comply with the notice requirement to the Eminent Domain Code (26 PS 1-405). In that case the Declaration of Taking was filed September 5, 1967 but was not served until November 1, 1967. The explanation for the delay is that the Assistant Attorney General handling the matter died suddenly and in the confusion delay resulted in getting notice to the condemnee. There is no allegation that the delay resulted in prejudice to the rights of the condemnee. Both the condemnor and the condemnee cite Commonwealth vs. Luken Steel Company, 402 Pa. 304 in support of their respective positions. The general rule prohibits the courts from waiving or extending statutory notice requirements. We conclude that this delay in giving timely notice falls within the exception to the general rule. This is particularly true since the condemnee does not claim that he was prejudiced by the delay.

All the condemnees object that the Declaration of Taking is at variance with the resolution of the Pennsylvania Game Commission. These resolutions provide "- - - that the Commission acquire by condemnation a fee simple estate or interest in and to - - -."

¶ 7 of the Declaration of Taking purports to condemn "- - - the surface only of the land hereinbefore described - - -."

Exhibit B—Opinion & Order Dismissing Declaration.

The general rule is that in exercising the power of eminent domain the Commonwealth acquires a title in fee simple to the land appropriated by it. A fee simple interest or estate in land is the greatest estate one can possess, being an absolute estate in perpetuity. A title in fee or fee simple is a full and absolute estate beyond and outside of which there is no other interest or right. It is the entire and absolute interest and property in the land, the largest estate in land known to the law, and implies absolute dominion over the land. (See 28 Am. Jur. 2d Estates ¶ 9 and 10.)

This particular taking is under the Project 70 Land Acquisition Act of 1964. (72 PS 3946.1 *et seq.*) The Act of June 3, 1937 PL 1225 (34 PS 1311.901) provides for acquisition of lands by the State Game Commission. Both Acts authorize the taking of less than a fee simple interest in lands.

The resolution of the Pennsylvania Game Commission condemned a fee simple interest in the lands of the condemnees. This authority could neither be enlarged, reduced, nor changed by the Attorney General or representatives of the Pennsylvania Game Commission. The Declaration of Taking must conform to the resolution of the condemning body.

At the pleading stage the condemnee is entitled to know exactly what the condemnor is taking.

Exhibit B—Opinion & Order Dismissing Declaration.

ORDER

Now, February 13, 1968 the Preliminary Objections relating to the failure to give timely notice in the case of Pennsylvania Game Commission versus Pressley L. Hilliard at A. D. #232 September Term, 1967 are dismissed. Resolutions of the Pennsylvania Game Commission have been filed. Therefore, Preliminary Objections relating to the failure of the Commonwealth to attach copies of said resolutions to the Declaration of Taking are dismissed. The Court orders copies of these resolutions to be filed with the pleadings in each case.

The Preliminary Objections in each case to ¶ 7 of the Declaration of Taking are sustained. The Declaration of Taking in each case shall be dismissed unless the condemnor files an amended declaration of taking within 20 days from the date of this order.

BY THE COURT,
GEORGE P. KIESTER,
GEORGE P. KIESTER, *Judge.*

February 13, 1968.

EXHIBIT C

Amendment to Complaint.

Filed February 27, 1968.

IN THE
COURT OF COMMON PLEAS
OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA Acting by and through the PENNSYLVANIA GAME COMMISSION,

VS.

PRESSLEY L. HILLIARD.

A. D. #232 Sept. Term, 1967,
Book 90, Page 307.

AND NOW, TO WIT, February 27, 1968, the plaintiff, Commonwealth of Pennsylvania, acting by and through the Pennsylvania Game Commission in pursuance of the Order of Court dated February 13, 1968, amends Paragraph 7 of its Complaint to read as follows:

No. 7—

The nature of the title or interest hereby appropriated and acquired by the Condemnor is the fee simple estate or interest, in and to the land hereinbefore described, and in and to, each and every part thereof.

ROBERT J. STOCK,
ROBERT J. STOCK,
Attorney for Condemnor.

EXHIBIT D

Preliminary Objections to Amended Declaration of Taking

Filed March 28, 1968 and *Nunc Pro Tunc* April 17, 1968.

IN THE
COURT OF COMMON PLEAS
OF BUTLER CO., PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA Acting by and through the PENNSYLVANIA GAME COMMISSION,

VS.

RUTH R. BOOKSER and EDWARD F. BOOKSER, her husband.

A. D. 234 Sept. Term, 1967.

The condemnees, Ruth R. Bookser and Edward F. Bookser, by their attorney, Lee C. McCandless, file the following Preliminary Objections to the Amended Declaration of Taking:

I

The taking of land does not come within the spirit, intent, or purpose of Project 70 and the Act of Assembly for said territory in which the subject land is located is not threatened by urban development which the Act makes a pre-requisite to the right to condemn.

Exhibit D—Preliminary Objections to Amended Declaration.

II

The attempted condemnation has been done without investigation, study or analysis and at the urging of sportsmen and constitutes an arbitrary, unjustified and unwarranted attempt to exercise the power of eminent domain.

III

The land sought to be condemned is an arbitrary and unreasonable exercise of discretion and not needed for the welfare of the general public.

IV

The attempted exercise of the right of eminent domain as to the subject property is arbitrary, unreasonable and in violation of the authority not authorized by Statute and contrary to the Constitution and deprives the condemnees of their property right without due process of law as they are engaged in a productive activity and have no place to turn to carry on their activity in the immediate area.

WHEREFORE, showing the above matters, it is respectfully moved the Declaration of Taking as amended be struck from the record.

LEE C. McCANDLESS,
CHARLES T. CHEW &
SILVIO P. CERCHIE,

By LEE C. McCANDLESS,
Attorney for Defendant.

EXHIBIT E

Motion for Leave to File Preliminary Objections *Nunc Pro Tunc*

Filed April 17, 1968.

IN THE
COURT OF COMMON PLEAS
BUTLER CO., PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

VS.

RUTH R. BOOKSER and EDWARD F. BOOKSER, her husband.

A. D. 234 Sept. Term, 1967.

By Order of this Court made February 13, 1968, Preliminary Objections filed by the condemnee were sustained and the Declaration of Taking dismissd unless the condemnor filed an amended Declaration of Taking within twenty days from the date of said Order.

An Amendment was filed and within thirty days thereafter the condemnee filed Preliminary Objections to the Amended Declaration through his attorney to which the Commonwealth of Pennsylvania filed Preliminary Objections to the Preliminary Objections to the Amended Decla-

Exhibit E—Motion and Permission of Court to File Preliminary Objections Nunc Pro Tunc.

ration raising, among other things, the fact that the Preliminary Objections filed on behalf of the condemnee were not sworn to.

WHEREFORE, showing that the condemnee has sworn to the Preliminary Objections as filed by his counsel on his behalf, it is requested that your Honorable Court grant permission to file the same *nunc pro tunc.*

LEE C. McCANDLESS,
Attorney for Defendants.

ORDER OF COURT

Now, April 17, 1968, the within Motion having been made and after due consideration the condemnee is granted permission to file the Preliminary Objections to Amended Declaration attached hereto *nunc pro tunc.*

BY THE COURT:
GEORGE P. KIESTER,
J.

Exhibit E—Motion and Permission of Court to File Preliminary Objections Nunc Pro Tunc.

Preliminary Objections to Amended Declaration of Taking

IN THE
COURT OF COMMON PLEAS
BUTLER CO., PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

VS.

RUTH R. BOOKSER and EDWARD F. BOOKSER, her husband.

A. D. 234 Sept. Term, 1967.

The condemnees, Ruth R. Bookser and Edward F. Bookser, by their attorney, Lee C. McCandless, file the following Preliminary Objections to the Amended Declaration of Taking:

I.

The taking of land does not come within the spirit, intent, or purpose of Project 70 and the Act of Assembly for said territory in which the subject land is located is not threatened by urban development which the Act makes a pre-requisite to the right to condemn.

Exhibit E—Motion and Permission of Court to File Preliminary Objections Nunc Pro Tunc.

II.

The attempted condemnation has been done without investigation, study or analysis and at the urging of sportsmen and constitutes an arbitrary, unjustified and unwarranted attempt to exercise the power of eminent domain.

III.

The land sought to be condemned is an arbitrary and unreasonable exercise of discretion and not needed for the welfare of the general public.

IV.

The attempted exercise of the right of eminent domain as to the subject property is arbitrary, unreasonable and in violation of the authority not authorized by Statute and contrary to the Constitution and deprives the condemnees of their property right without due process of law as they are engaged in a productive activity and have no place to turn to carry on their activity in the immediate area.

WHEREFORE, showing the above matters, it is respectfully moved the Declaration of Taking as amended be struck from the record.

LEE C. McCANDLESS,
Attorney for Defendant.

EXHIBIT F

Opinion

Filed April 30, 1968.

IN THE
COURT OF COMMON PLEAS
OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

VS.

CARL HILLIARD,

A. D. No. 233 September Term, 1967.

Appearances:
For the Commonwealth:
For the Defendant: Lee C. McCandless, Esq.

Honorable John Q. Stranahan,
35th Judicial District,
Specially Presiding.

This matter arises from a condemnation proceeding brought by the Commonwealth of Pennsylvania for the purpose of condemning 82.9 acres of land in Washington Township, Butler County, Pennsylvania. The proceeding is brought by the Pennsylvania Game Commission under the authority of Project 70.

Exhibit F—Opinion & Order Dismissing Preliminary Objections Filed 4/4/68 and 4/17/68.

On September 5, 1967, the Commonwealth filed a declaration of taking indicating condemnation of 82.9 acres in Washington Township, but further indicating that only the surface of the land had been condemned.

On November 21, 1967 the condemnee filed preliminary objections to the declaration of taking alleging, among other things, that the declaration of taking was vague as to the interest condemned. It was also alleged that timely notice had not been given.

On December 12, 1967 the Commonwealth filed an answer to the preliminary objections and on February 13, 1968 the Court entered an order dismissing the preliminary objections as far as they related to the failure to give timely notice, but sustained one of the preliminary objections as follows:

> "The preliminary objections in each case to paragraph 7 of the declaration of taking are sustained. The declaration of taking in each case shall be dismissed unless the condemnor files an amended declaration of taking within 20 days from the date of this order."

On February 28, 1968 the condemnor filed an amended declaration of taking in which paragraph 7 was amended to indicate that the Commonwealth was condemning the land in fee simple. The condemnee then filed, on April 4, 1968, preliminary objections to the amended declaration of taking alleging, among other things, that the taking did not come within the spirit of Project 70 and that the condemnation of the land was arbitrary and unreasonable. Since facts were set forth in the preliminary objections to the amended declaration of taking and these facts were

Exhibit F—Opinion & Order Dismissing Preliminary Objections Filed 4/4/68 and 4/17/68.

not sworn to, the Court subsequently permitted preliminary objections, properly sworn to, to be filed *nunc pro tunc.*

On April 17, 1968 preliminary objections to the preliminary objections and an answer to the preliminary objections were filed by the Commonwealth. On April 24, 1968 the condemnee filed a motion to strike the preliminary objections to the preliminary objections.

The Eminent Domain Code, 1964, Special Sessions, June 22, P. L. 84, Art. III, Section 303; 26 P. S. 1-303, provides in part:

> "It is intended by this Act to provide a complete and exclusive procedure and law to govern all condemnations of property for public purposes . . ."

This section of the act indicates that the procedural matters contained in this act are to be used exclusively and therefore other types of pleadings as provided by the various rules of civil procedure are not incorporated into the Eminent Domain Code. This is further borne out by the fact that there is a specific section of the Code dealing with a pleading known as a declaration of taking and in Section 406 of the Code provision is made for preliminary objections. There is no provision for the filing of answers or preliminary objections to preliminary objections, and therefore the pleadings in a condemnation proceeding are limited to a declaration of taking and preliminary objections.

In Section 406 (c) it provides:

> "All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent."

Exhibit F—Opinion & Order Dismissing Preliminary Objections Filed 4/4/68 and 4/17/68.

The Commonwealth argues in this case that the preliminary objections to the amended declaration of taking which allege that the condemnation is not in the spirit of Project 70 and is arbitrary and unreasonable is in fact second preliminary objections to the original declaration of taking. Since the matters complained of in these preliminary objections are not the result of the amended declaration of taking, but are the result of the original declaration of taking, the preliminary objections to the amended declaration of taking are in violation of Section 406 (c).

It is true that if an amended declaration of taking raises additional matter to which preliminary objections could be taken, the condemnee would have the right to file second preliminary objections to the additional matter, but that is not the case here since the amended declaration of taking raises nothing in the way of new matter which would be the grounds for second preliminary objections. If the condemnee intends to file preliminary objections, he is required to raise all of his preliminary objections at one time. If on the other hand he fails to raise preliminary objections, he does not have the right to later raise them by means of second preliminary objections even though they may be valid objections.

The condemnee suggests that the order of February 13, 1968 in effect dismissed the declaration of taking and therefore the amended declaration of taking filed February 27, 1968 was in effect a new declaration of taking and permitted the condemnee to file new preliminary objections.

We have reviewed the order signed by the Court and we do not believe that this order dismisses the declaration of

taking, but rather believe that it directs an amended declaration of taking to be filed within 20 days. This was done and the Commonwealth complied with the Court Order.

We therefore must rule that the preliminary objections filed by the condemnee on April 17, 1968 are in violation of Section 406 (c) of the Eminent Domain Code and are improper. Such being the case the preliminary objections to the preliminary objections and answer to the preliminary objections filed by the condemnor and the motion to strike filed by the condemnee are surplusage.

ORDER

AND NOW, April 30, 1968, the preliminary objections to the amended declaration of taking filed April 4, 1968 and the preliminary objections *nunc pro tunc* filed April 17, 1968 are dismissed. Such being the case the preliminary objections to the preliminary objections filed April 17, 1968 and the motion to strike filed April 24, 1968 are dismissed.

BY THE COURT:
/s/ JOHN Q. STRANAHAN,
Judge Specially Presiding,
35th Judicial District.

EXHIBIT G

Appeal on Behalf of Condemnee

Filed August 15, 1969.

IN THE
COURT OF COMMON PLEAS
OF BUTLER CO., PENNSYLVANIA
CIVIL DIVISION—LAW

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION,

VS.

79.4 acres of land in Washington Township, Butler County, Pennsylvania, and RUTH R. BOOKSER and EDWARD F. BOOKSER, her husband.

A. D. No. 234, Sept. Term, 1967.
Book 90 Page 309.

The Condemnee appeals from the award of viewers filed, raising objections and issues of fact.

OBJECTIONS.

I.

The Court failed to take testimony on issue raised by Preliminary Objections and answer thereto.

II.

The Court failed to dispose of all Preliminary Objections.

Exhibit G—Appeal from Award of Viewers Raising Questions of Law and Answer.

III.

The viewers refused to hear any issues raised, except the "fair market value"

IV.

The Court failed to allow Preliminary Objections to be filed to the taking of the minerals.

TRIAL BY JURY IS REQUESTED ON THE FOLLOWING ISSUES.

I.

Does the taking come within the spirit, intent and, or purpose of the Project 70 Land Acquisition Act, and have all the prerequisites of the Act been met?

II.

Is the taking for a public use?

III.

Is the taking excessive?

IV.

What is the fair market value of the property taken?

LEE C. McCANDLESS,
CHARLES T. CHEW,
FRANK P. KRIZNER,

By LEE C. McCANDLESS.

.....

EXHIBIT H

Praecipe for Writ of Possession Pursuant to 26 P. S. 1-407

Filed March 5, 1971.

IN THE
COURT OF COMMON PLEAS
OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

VS.

CARL HILLIARD.

A. D. 233 Sept. Term, 1967
Book 90 Page 308

TO THE PROTHONOTARY:

Issue a rule upon Carl Hilliard of Washington Township, Butler County, Pennsylvania, returnable in five days after service, to show cause why a Writ of Possession should not issue to obtain possession of the land, being 78.9 acres of land in Washington Township, Butler County, Pennsylvania, which is more fully described in the declaration of taking filed in this Court at the above number and term, on September 5, 1967. Estimated just compensation was paid into Court by the condemnor on July 14, 1969.

ROBERT J. STOCK,
ROBERT J. STOCK,
Attorney for Condemnor.

Exhibit H—Praecipe for Writ of Possession and Answer.

Answer to Praecipe for Writ of Possession

March 8, 1971.

IN THE
COURT OF COMMON PLEAS
OF BUTLER CO., PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

PRESSLEY L. HILLIARD.

A. D. 232 Sept. Term, 1967.

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

CARL HILLIARD.

A. D. 233 Sept. Term, 1967.

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

RUTH R. BOOKSER and EDWARD F. BOOKSER, her husband.

A. D. 234 Sept. Term, 1967.

Exhibit H—Praecipe for Writ of Possession and Answer.

The parties by their counsel, makes Answer to the Praecipe for Writ of Possession as follows:

I.

That there are questions of law pending before this Court on an appeal from the Viewers Report and also on a Petition recently presented to determine the condemnors right or power to take the property particularly raised in the following issues:

1. The failure of the Court to dispose of Preliminary Objections heretofore raised.

2. Whether or not the taking was for a public use.

3. Whether or not the taking was excessive.

4. Whether or not the condemnor had abused its discretion and the taking is not in good faith.

5. Whether or not the condemnees have been deprived of their constitutional rights heretofore referred to and whether or not they have been accorded due process of law.

WHEREFORE, showing these things, it is respectfully prayed the Writ of Possession be dismissed.

McCANDLESS, CHEW & KRIZNER,

By LEE C. McCANDLESS,
Attorneys for Condemnees.

EXHIBIT I

Petition to Permit Condemnees to Present Testimony on the Power and Right of the Commission to Condemn Preliminary to the Determination of Damages

Filed April 15, 1971.

IN THE
COURT OF COMMON PLEAS
OF BUTLER CO., PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

PRESSLEY L. HILLIARD.

A. D. 232 Sept. Term, 1967.
Book 90 Page 307.

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

CARL HILLIARD.

A. D. 233 Sept. Term, 1967.
Book 90 Page 308

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

RUTH R. BOOKSER and EDWARD F. BOOKSER, her husband.

A. D. 234 Sept. Term, 1967.
Book 90 Page 309.

Exhibit I—Petition to Permit Condemnees to Take Testimony on the Power and Right to Condemn and Praecipe for Writ of Possession and Answer.

To The Honorables, The Judges Of Said Court:

The condemnees have a common question of law and fact which, by various inadvertent rulings contrary to the statute and procedure, have been deprived of their Constitutional right of due process of law and, therefore, request this Court to permit the condemnees to defend against the power or right to condemn based on the following:

I.

Preliminary Objection No. 6, which was denied by the condemnor in its Answer to the Objections thus raising an issue of fact, was never disposed of by the Court although the Eminent Domain Act (26 P. S. 1-406(e)) provides that in such instances the Court shall take testimony by deposition or otherwise and shall dispose of all preliminary objections.

The Court, on the original Preliminary Objections of February 13, 1968, dismissed the Declaration of Taking in each case unless the condemnor filed an amendment. The amendment filed took additional rights and the condemnees, with permission of the Court as authorized by statute (26 P. S. 406(a)) filed Preliminary Objections thereto which have never been disposed of on the merits even though the amendment constituted a new taking and an abandonment of the original taking as to the title acquired.

The Court inadvertently ruled that to this new taking, no new objections could be filed under Sub-section (c) of Section 406 of the Eminent Domain Code. From this ruling

an appeal was taken to the Supreme Court of the Commonwealth of Pennsylvania and an order handed down "Affirmed—*Per Curiam*".

II.

The condemnees then applied to the United States District Court for an injunction against the Game Commission and its officers and the District Court found that the following Federal Constitutional questions were presented:

> "1. Whether the taking of plaintiff's properties by the Game Commission with the intention, among others, to lease or contract out portions thereof to private sharecroppers, constitutes a unconstitutional taking for private use."
>
> "2. Whether the Game Commission's taking of plaintiffs' entire properties in fee rather than lesser portions thereof was an abuse of discretion and in bad faith."
>
> "3. Whether the lower State Court had denied plaintiffs due process of law by denying them a hearing upon federal constitutional questions on the ground that by procedural default, plaintiffs waived the opportunity to raise those questions."

The Court further stated: "I am of the opinion that the second issue presents a Federal question which is substantial." But it denied relief on the grounds that the failure to appeal from the Supreme Court of Pennsylvania to the United States Supreme Court rendered the matter *res adjudicata*.

Exhibit I—Petition to Permit Condemnees to Take Testimony on the Power and Right to Condemn and Praecipe for Writ of Possession and Answer.

An appeal was taken to the Circuit Court of Appeals but relief was denied by virtue of an Act of Congress (28 U. S. C. A. 2283) prohibiting the Federal Court from staying a proceedings in the State Court. But the Court was most careful to limit the effect and to not detract from the District Court's Opinion for it stated:

> "The order dismissing the complaint will be affirmed, but it shall stand as no more than an adjudication that section 2283 prohibits the granting of the relief sought."

III.

While the above proceedings were pending, the condemnees were forced to submit their damages to a Board of Viewers in Butler County from which an appeal has been taken, raising again the following questions:

1. The failure of the Court to take testimony on issues raised by Preliminary Objections.

2. The failure of the Court to dispose of all Preliminary Objections.

3. The refusal of the Board of Viewers to hear any issues raised except the fair market value.

4. The failure of the Court to allow Preliminary Objections to be filed to the taking of the minerals.

5. Whether the condemnation was within the spirit, intent or purpose of the Project 70 Land Acquisition Act and whether all pre-requisites under said Act have been made.

6. Was the taking for public use.

7. Was the taking excessive.

Exhibit I—Petition to Permit Condemnees to Take Testimony on the Power and Right to Condemn and Praecipe for Writ of Possession and Answer.

This appeal was taken under the Eminent Domain Act (26 P. S. 1-515) which permits the raising of all objections of law or fact and a trial by jury was demanded.

WHEREFORE, showing that the condemnees have been deprived of due process of law; that the Court has never taken testimony on the power or right to condemn as raised by the Preliminary Objections and by the Second Preliminary Objections and on an appeal, repectfully requests this Court to set a hearing for the purpose of taking testimony to determine the issues raised on the right or power to condemn, either before the Court or before a jury but prior to the submission of the issue or damages to a jury.

Respectfully submitted,

McCANDLESS, CHEW & KRIZNER,

By LEE C. McCANDLESS,
Attorneys for Condemnees.

Exhibit I—Petition to Permit Condemnees to Take Testimony on the Power and Right to Condemn and Praecipe for Writ of Possession and Answer.

Answer to Petition to Permit Condemnees to Present Testimony, Etc.

Filed April 22, 1971.

IN THE
COURT OF COMMON PLEAS
OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

PRESSLEY L. HILLIARD.

A. D. No. 232 Sept. Term, 1967.
Book 90 Page 307.

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

CARL HILLIARD.

A. D. No. 233 Sept. Term, 1967.
Book 90 Page 308.

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA GAME COMMISSION,

vs.

RUTH R. BOOKSER and EDWARD F. BOOKSER, her husband.

A. D. No. 234 Sept. Term, 1967.
Book 90 Page 309.

Exhibit I—Petition to Permit Condemnees to Take Testimony on the Power and Right to Condemn and Praecipe for Writ of Possession and Answer.

The condemnor, by its counsel, makes answer to the petition to permit condemnees to present testimony, etc., as follows:

I.

All matters raised in Paragraph I have been fully litigated through the state courts, to the Pennsylvania Supreme Court, as indicated in condemnees' own petition. It is further denied that the condemnees have been denied any of their constitutional rights of due process.

II.

It is admitted that the condemnees redress in the Federal District Court. It is submitted that the record of the Federal District Courts speaks for itself. It is denied that the condemnees have been deprived of their constitutional rights of due process. It is admitted that the District Court denied condemnees any relief, on the basis that the matter was *res adjudicata,* since no appeal was taken from the Supreme Court of Pennsylvania to the United States Supreme Court. It is admitted that an appeal was taken to the Circuit Court of Appeals, which affirmed the United States District Court. It is submitted that all matters alleged in Paragraph II of the petition are now *res adjudicata.*

III.

It is admitted that the Board of View held hearings, and entered an award. These have been appealed. It is

Exhibit I—Petition to Permit Condemnees to Take Testimony on the Power and Right to Condemn and Praecipe for Writ of Possession and Answer.

denied that any of the allegations contained in sub-paragraphs under Paragraph III were properly before the Board of View.

In further reply and answer, condemnor avers that all matters contained in condemnees' petition have been fully litigated through the state courts to the Pennsylvania Supreme Court, and in the federal courts to the United States Court of Appeals for the Third Circuit, and are not now properly before this court. It is futher averred that said matters will not be properly before this Court on the trial of the eminent domain cases, those being limited solely to the item of damages. It is further averred that the Eminent Domain Code, Section 1-515, does not permit raising the issue of constitutionality of the take, on appeal from the viewer's report, those having to be preliminarily disposed of under Section 1-406.

WHEREFORE, the Court is respectfully requested to dismiss the petition for the rule to show cause, so that the case may be set for trial on the issue of damages.

ROBERT J. STOCK,
ROBERT J. STOCK,
Attorney for Condemnor.

Exhibit I—Petition to Permit Condemnees to Take Testimony on the Power and Right to Condemn and Praecipe for Writ of Possession and Answer.

Commonwealth of Pennsylvania, }
County of Butler. } ss.:

Before me, personally appeared ROBERT J. STOCK, ESQ., who being duly sworn deposes and says that he is familiar with all allegations contained in the within answer, that they are all true and correct to the best of his knowledge, information and belief, and that he makes this affidavit because the condemnor is outside the jurisdiction of the Court and the affidavit cannot be obtained within the time allowed for filing of the answer, and further, because the averments contained therein all raise issues of law from facts already established in Courts of record.

ROBERT J. STOCK.

Sworn to and subscribed before
me this .... day of ....., 1971.

.....,
Notary Public.
My Commission expires: .....

EXHIBIT J

Opinion

Filed June 4, 1971.

IN THE
COURT OF COMMON PLEAS
BUTLER COUNTY, PENNSYLVANIA
CIVIL DIVISION—LAW

COMMONWEALTH OF PENNSYLVANIA acting by and through the PENNSYLVANIA COMMISSION,

vs.

PRESSLEY L. HILLIARD.

A. D. #232 Sept. Term, 1967.
Book 90 Page 307

Lee C. McCandless for Condemnee.
Robert J. Stack for Commonwealth.

There are two matters before the Court:

1. The Rule to Show Cause why a writ of possession should not issue, and

2. A Petition to Permit Condemnees to Present Testimony on the Power and Right of the Commission to Condemn Preliminary to the Determination of Damages.

In general the aforestated petition raises the same questions of law that are incorporated in the Answer to the Praecipe for a Writ of Possession.

Exhibit J—Opinion of Common Pleas Court Denying Hearing and Issuing Writ of Possession.

Currently the case is on appeal by the condemnee from an award made by a Board of Viewers that was confirmed on July 28, 1969. Pressley L. Hilliard was awarded $86,000.00 and the owners of an oil lease on the property $2,400.00. The Commonwealth of Pennsylvania deposited estimated just compensation of $60,150.00 with the Court on July 17, 1969. This deposit is at interest.

This and two companion cases have a lengthy history in the courts. The Declaration of Taking was filed September 5, 1967. This Court disposed of preliminary objections to the Declaration of Taking on February 13, 1968. In accordance with that order the Commonwealth of Pennsylvania amended to appropriate a fee simple title. Preliminary objections were filed to the Amended Declaration of Taking. The order of the Honorable John Q. Stranahan of the 35th Judicial District Specially Presiding was appealed to the Supreme Court of Pennsylvania. Judge Stranahan found that the Amended Declaration of Taking introduced nothing in the way of new matter that would be the basis for a second round preliminary objections. The Supreme Court affirmed *per curiam* on January 15, 1969.

At the oral argument on the matters currently before the Court counsel advised the Court that proceedings were instituted in the United States District Court for the Western District of Pennsylvania raising constitutional questions. The Circuit Court of Appeals affirmed the order of the United States District Court, dismissing the appeal. Neither Court decided the constitutional questions raised by the condemnee. This Court does not have before it a record of those proceedings.

Exhibit J—Opinion of Common Pleas Court Denying Hearing and Issuing Writ of Possession.

The thrust of the argument now presented in this Court is that condemnee's constitutional rights have been violated and that constitutional questions can be raised at any time. Law in support of this position has not been cited. The Eminent Domain Code provides that

> " - - - Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof. - - -" 26 PS 1—406.

With a few exceptions, such as a question of jurisdiction, an order overruling defendant's preliminary objections is interlocutory and unappealable under the Rules of Civil Procedure (Rule 1028). However, under the Eminent Domain Code an order dismissing condemnee's preliminary objection which attacked the validity of the taking is a final and appealable order. *Hanni Appeal*, 420 Pa. 289 (1966).

Section 406 (e) further states in part that

> "The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. If preliminary objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages as if the condemnation had been revoked under section 408, to be assessed as therein provided. - - -"

Exhibit J—Opinion of Common Pleas Court Denying Hearing and Issuing Writ of Possession.

Thus, the condemnee is entitled to damages should the condemnation be terminated at the appellate level.

In a concurring opinion in the Hanni case Justice Jones stated at page 294

> "The language of ¶ 406 coupled with the logic of providing an expeditious and time saving device for the immediate determination of the basic power or right to condemn compel only one conclusion, *i.e.*, that an order which determines this vital question be determined initially in the proceedings and be considered final and definitive so that appellate review, if sought, should be immediately available."

In the instant case the validity of the condemnation was raised by the preliminary objections and finally adjudicated by the Supreme Court of Pennsylvania. The condemnee has no right to have such matters re-adjudicated at this or the trial stage of the proceedings.

In light of the specific provisions of the Eminent Domain Code, the adjudication by the Supreme Court of Pennsylvania, and the record of protracted litigation, the Commonwealth is certainly entitled to possession of the premises without further delay.

Exhibit J—Opinion of Common Pleas Court Denying Hearing and Issuing Writ of Possession.

ORDER.

Now, June 4, 1971, based on the foregoing opinion and it appearing that estimated just compensation has been paid in to Court, a writ of possession is issued and the Sheriff is ordered to deliver possession of the premises to the Commonwealth of Pennsylvania within a period of sixty days or such other time as may be agreeable to both the parties.

Condemnee's Petition to Permit Condemnees to Present Testimony on the Power and Right of the Commission to Condemn Preliminary to the Determination of Damages is dismissed.

BY THE COURT,
GEORGE P. KIESTER,
President Judge.

June 4, 1971.

EXHIBIT K

Dissenting Opinion by Judge Mencer

Filed December 9, 1971.

IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,
Appellee,

v.

CARL HILLIARD,
Appellant.

No. 454 C. D. 1971

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,
Appellee,

v.

PRESSLEY L. HILLIARD,
Appellant.

No. 455 C. D. 1971

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,
Appellee,

v.

EDWARD F. BOOKSER and RUTH R. BOOKSER,
his wife,
Appellants.

No. 456 C. D. 1971

Exhibit K—Commonwealth Court of Pennsylvania—Opinion & Dissenting Opinions affirming Lower Court.

Before:

Hon. James S. Bowman, President Judge.
Hon. James C. Crumlish, Jr., Judge.
Hon. Harry A. Kramer, Judge.
Hon. Roy Wilkinson, Jr., Judge.
Hon. Louis L. Manderino, Judge.
Hon. Glenn E. Mencer, Judge.
Hon. Theodore O. Rogers, Judge.

Argued: October 20, 1971.

Filed December 9, 1971

I respectfully dissent. On September 5, 1967, the Pennsylvania Game Commission filed a declaration of taking under the Eminent Domain Code of 1964,[1] describing as the interest taken the surface rights only to appellants' three adjacent tracts of land located in Washington Township, Butler County, Pennsylvania. Appellants, as condemnees, thereupon filed, in the Court of Common Pleas of Butler County, preliminary objections to the declaration of taking. One objection challenged the authority of the condemnor to acquire the land because of an alleged failure to comply with the standards for acquisition under the Project 70 Land Acquisition and Borrowing Act.[2]

Article IV of the Eminent Domain Code[3] deals with the procedure to condemn. Section 406 thereof provides that preliminary objections shall be the exclusive method of

[1]Act of June 22, 1964, P. L. 84, 26 P. S. § 1-101 *et seq.*

[2]Act of June 22, 1964, P. L. 131, No. 8, 72 P. S. § 3946.1 *et seq.*

[3]Act of June 22, 1964, P. L. 84, 26 P. S. §§ 1-401 to 1-410.

challenging the power or the right to condemn, or the declaration of taking, and Section 406(e), 26 P. S. § 1-406, specifically provides that "[t]he court [of common pleas] shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require . . .".

My dissent is simple but basic. The Court of Common Pleas of Butler County, contrary to the mandate of Section 406(e), has never determined, promptly or otherwise, the preliminary objection most vital to the proceeding, an objection which challenged the power or right of the condemnor to appropriate the property.

The declaration of taking in the present cases stated that the power to condemn was by virtue of the provisions of the Project 70 Land Acquisition and Borrowing Act. This Act laid down certain requirements under which land could be acquired. No. 6 of the preliminary objections filed to the initial declaration of taking challenged the condemnor's compliance with these requirements. As yet, no court has ruled upon this all important objection. The majority states that "[a]ppellants find it difficult to accept what appears to them to be an unjust decision, or indeed the absence of a decision on an important point, and it is a compliment to the tenacity and ingenuity of their able counsel that he has been able to continue to raise the question, albeit unsuccessfully". I, likewise, find it difficult to accept the absence of a decision on such an important point as the power or right of the condemnor to appropriate the condemnee's property. This is the most basic question that could be raised in this proceeding and yet it never has been passed upon by any court.

Exhibit K—Commonwealth Court of Pennsylvania—Opinion & Dissenting Opinions affirming Lower Court.

The majority concludes that the propriety of the taking here was settled by *Commonwealth v. Hilliard,* 433 Pa. 599, 249 A. 2d 536 (1969). The *Per Curiam* opinion of the Supreme Court merely stated, "Order affirmed". What order and what did it rule upon? The answer is that it was the lower court's order of April 30, 1968, which was as follows: "And Now, April 30, 1968, the preliminary objections to the amended declaration of taking filed April 4, 1968 and the preliminary objections *nunc pro tunc* filed April 17, 1968 are dismissed. Such being the case the preliminary objections to the preliminary objections filed April 17, 1968 and the motion to strike filed April 24, 1968 are dismissed."

It appears to me that the Supreme Court affirmed *Per Curiam* in *Commonwealth v. Hilliard, supra,* the lower court's dismissal of preliminary objections filed in April 1968 to an amended declaration of taking. I fail to see how that disposes of preliminary objections filed on November 21, 1967 to the initial declaration of taking.

The majority does not conclude that the lower court's order of February 13, 1968 ruled upon No. 6 of appellants' preliminary objections, being the objection challenging the condemnor's power to appropriate, since an examination of that order discloses that the court sustained one objection, rejected another and was silent upon the remaining objections, including the vital objection numbered "6". If the majority had concluded that it was the lower court's order of February 13, 1968 that passed upon the objection to the propriety of the taking, rather than the *Per Curiam* decision by the Supreme Court in *Commonwealth v.*

Hilliard, supra, I would still have been troubled in this case, since I am satisfied that the lower court did not rule upon objection No. 6 in its order of February 13, 1968. My point, however, is that the Supreme Court only affirmed the lower court's order of April 30, 1968, which dismissed preliminary objections filed in April 1968 to an amended declaration of taking and had nothing to do with, or any effect upon, earlier preliminary objections timely filed but not ruled upon. Since the issues were not the same, I do not believe *res judicata* is applicable.

The majority cites *Hilliard v. Commonwealth of Pennsylvania,* 308 F. Supp. 756 (W. D. Pa. 1970), for the proposition that the District Court concluded that the decision of the Supreme Court in *Commonwealth v. Hilliard, supra,* was *res judicata* on the question of the propriety of the taking. I do not so read that case. The plaintiffs there, appellants here, raised three federal constitutional questions (page 760):

> "1. Whether the taking of plaintiffs' properties by the Game Commission with the intention, among others, to lease or contract out portions thereof to private sharecroppers, constitutes an unconstitutional taking for private use.
>
> "2. Whether the Game Commission's taking of plaintiffs' entire properties in fee rather than lesser portions thereof was an abuse of discretion and in bad faith.
>
> "3. Whether the lower State Court has denied plaintiffs due process of law by denying them a hearing upon federal constitutional questions on the ground that, by procedural default, plaintiffs waived the opportunity to raise those questions."

Exhibit K—Commonwealth Court of Pennsylvania—Opinion & Dissenting Opinions affirming Lower Court.

The Court, at page 760, concluded relative to the constitutional questions as follows: "While I have thus concluded that plaintiffs have presented a substantial federal question conferring subject matter jurisdiction on this Court, nevertheless, I must find that the prior adjudication in the State eminent domain proceeding, as affirmed on appeal to the Supreme Court of Pennsylvania, forecloses plaintiffs from litigating herein each and every constitutional question raised. The doctrine of *res judicata* so requires."

Thus it was held only that *Commonwealth v. Hilliard, supra,* was *res judicata* to the federal constitutional questions raised in *Hilliard v. Commonwealth of Pennsylvania, supra,* but I believe this is not the same as concluding that *Commonwealth v. Hilliard, supra,* was *res judicata* as to an objection raised, never ruled upon, and not before the Supreme Court of Pennsylvania when it affirmed without opinion in the lower court's order of April 30, 1968, dismissing other preliminary objections.

My difference with the majority centers on what the *Per Curiam* order of the Supreme Court in *Commonwealth v. Hilliard, supra,* accomplished. The majority states that the Court held that "it was too late to raise the issue of the propriety of the taking, at least it is quite clear that that was its decision and, therefore, it is *res judicata* between the parties in this case". I offer that the Supreme Court held that the lower court was correct in not permitting appellants to file additional preliminary objections to the amended declaration of taking and that its *Per Curiam*

affirmance goes no further than the lower court's order of April 30, 1968, which was the subject of the affirmance.

Thus, I also find it difficult to accept the absence of a ruling upon the vital question as to whether the condemnor has the power or right to condemn. I would reverse and remand to the lower court to rule upon the preliminary objections filed to the initial declaration of taking which have yet to be decided.

GLENN E. MENCER,
J.

Judge Crumlish joins in this dissent.

Certified from the Record:
Francis C. Barbush,
(SEAL) Chief Clerk
Dec. 9, 1971.

Exhibit K—Commonwealth Court of Pennsylvania—Opinion & Dissenting Opinions affirming Lower Court.

Opinion

Filed December 9, 1971.

IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION,

Appellee,

v.

CARL HILLIARD,

Appellant.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION,

Appellee,

v.

PRESSLEY L. HILLIARD,

Appellant.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION,

Appellee,

v.

EDWARD F. BOOKSER and RUTH R. BOOKSER, his wife,

Appellants.

Nos. 454, 455, 456 C. D. 1971.

Exhibit K—Commonwealth Court of Pennsylvania—Opinion & Dissenting Opinions affirming Lower Court.

Before: Honorable James S. Bowman, *President Judge,*
Honorable James C. Crumlish, Jr., *Judge,*
Honorable Harry A. Kramer, *Judge,*
Honorable Roy Wilkinson, Jr., *Judge,*
Honorable Louis L. Manderino, *Judge,*
Honorable Glenn E. Mencer, *Judge,*
Honorable Theodore O. Rogers, *Judge.*

Argued: October 20, 1971.

Opinion by Judge Wilkinson, December 9, 1971.

The history of the litigation of these companion cases began on September 5, 1967, with the filing of a Declaration of Taking in the Court of Common Pleas. This was followed promptly by the filing of Preliminary Objections raising several points. An Answer was filed to the Preliminary Objections, argument had, and the court filed an Opinion and Order on February 14, 1968. The court discussed several of the points raised in the Preliminary Objections, indicating they were without merit, and entered an Order dismissing several, sustaining one, but notably failing to discuss or expressly rule upon the objection that stated:

> "The Declaration fails to show the standards for acquisition under Project 70 Land Acquisition and Borrowing Act has been complied with (72 P. S. 3946.18)". Record at 26a.

The answer to this Preliminary Objection was in the alternative, denying that it was necessary to allege compliance and stating that compliance had been alleged.

Exhibit K—Commonwealth Court of Pennsylvania—Opinion & Dissenting Opinions affirming Lower Court.

An Amended Complaint was filed to comply with the court's Order allowing the Amended Complaint to correct the one Preliminary Objection which it had sustained, *i.e.*, requiring the declaration of taking to be changed to a taking in fee rather than merely taking the surface. Appellants filed Preliminary Objections to the Amended Complaint. These Preliminary Objections raised the question of the propriety of the taking as not being within the spirit, intent or purpose of Project 70, was arbitrary and unreasonable, not in the public interest, and violative of appellants' constitutional rights. The Commonwealth filed Preliminary Objections to the Preliminary Objections on the grounds that Preliminary Objections to the Amended Complaint must be limited to those new matters introduced into the case by the amendment. Argument was had with appellants pressing their rights to file the Preliminary Objections because the Amended Complaint was in fact a new complaint and because these Preliminary Objections had been filed to the original complaint and were undisposed of by the court's Opinion or Order. The court ruled that the Amended Complaint was just that and not a new complaint and that Section 406(c) of the Eminent Domain Code, Act of June 22, 1964, P. L. 84, Special Session, as amended, 26 P. S. § 1-406, precluded raising Preliminary Objections that could have or had been raised to the original complaint. This decision was confirmed by the Supreme Court of Pennsylvania with a *Per Curiam* Opinion merely stating, "Order affirmed". *See Commonwealth v. Hilliard et al.*, 433 Pa. 599, 249 A. 2d 536 (1969).[1] There-

[1] Appellants' paper book in the appeal to the Supreme Court contained the following statement of "Question Involved":

(Footnote continued on following page)

fore, while neither appellants nor this Court can know the reasoning on which the Supreme Court sustained the lower's court's ruling that it was too late to raise the issue of the propriety of the taking, at least it is quite clear that that was its decision and, therefore, it is *res judicata* between the parties in this case.

Following the Supreme Court's decision, viewers were appointed, made an award, and appellant appealed to the Court of Common Pleas. During the time the matter was before the Board of View, apparently recognizing the finality of the Pennsylvania Supreme Court's ruling, absent an allowance of an appeal to the Supreme Court of the United States, appellant instituted an action in the U. S. District Court for the Western District of Pennsylvania to enjoin the appellee from proceeding until the propriety of the taking had been determined. After an exhaustive discussion of the facts, the District Court concluded that the decision of the Supreme Court of Pennsylvania was *res adjudicata*. *Hilliard v. Commonwealth of Pennsylvania*, 308 F. Supp. 756 (D. C. W. D. Pa. 1970). Having been denied relief by the Federal Courts, appellant pursued the appeal from the Board of View, petitioning the Court of

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(Footnote continued from preceding page)

"In an eminent domain case where the Court below sustained one of the Preliminary Objections without ruling on the others and dismissed the Declaration of Taking unless an amendment was filed thereto, which was done, and to which amendment Preliminary Objections were filed reiterating the Preliminary Objections previously filed but not ruled upon by the Court, did the Court err in dismissing the Preliminary Objections because the eminent domain Code required all Objections to be filed at one time?

Answered in the negative by the Court below."

Exhibit K—Commonwealth Court of Pennsylvania—Opinion & Dissenting Opinions affirming Lower Court.

Common Pleas to have a jury determine not only the propriety of the amount of the award, but also for the jury to determine, preliminarily, the propriety of the taking. Appellee filed a Rule to Show Cause why a Writ of Possession should not issue. The court considered these two matters together, granted the Writ of Possession, and dismissed the petition of appellant to present testimony on the propriety of the taking. From this Order, the present appeal was taken.

We believe it would be accurate to say that in every case in which *res adjudicata* is a bar, one litigant is asserting that the issue he raises either was not decided or was not decided properly in prior litigation between the contesting parties. Appellant can, and does, argue that his original Preliminary Objection as to propriety was not decided by the lower court in its first decision and was improperly decided as being too late by the lower court in its second opinion. He cannot successfully argue that it was not decided by the Pennsylvania Supreme Court when he appealed that case and the lower court was affirmed. That decision did foreclose the possibility of appellants challenging the propriety and constitutionality of the taking in any subsequent proceedings taken under the Eminent Domain Code.

Appellants find it difficult to accept what appears to them to be an unjust decision, or indeed the absence of a decision on an important point, and it is a compliment to the tenacity and ingenuity of their able counsel that he has been able to continue to raise the question, albeit unsuccessfully.

Exhibit K—Commonwealth Court of Pennsylvania—Opinion & Dissenting Opinions affirming Lower Court.

Accordingly, the matter having been decided by the Supreme Court in *Commonwealth v. Hilliard et al., supra,* the decision of the court below is affirmed.

R. WILKINSON, *J.*,
ROY WILKINSON, JR., *Judge.*

Certified from the Record:
Francis C. Barbash,
(SEAL) Chief Clerk,
Dec. 9, 1971.

EXHIBIT L

Petition for Leave to Appeal

Filed December 30, 1971.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,

vs.

CARL HILLIARD,

Appellant.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,

vs.

PRESSLEY L. HILLIARD,

Appellant.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,

vs.

EDWARD F. BOOKSER and RUTH R. BOOKSER,
his wife,

Appellants.

To the Honorables, the Judges of said Court:

1. The Petitioners, the Hilliards and Booksers above named, seek to have reviewed a judgment of the Commonwealth Court of Pennsylvania dated December 9, 1971, in which two Judges dissented in the result.

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

2. The Petition is presented under Section 204 of the Appellate Court Jurisdiction Act of 1970 (17 P. S. 211.204).

QUESTIONS INVOLVED

Where Preliminary Objections are filed in an Eminent Domain case raising the question of the power and right to condemn and the Court dismisses the Complaint, unless amended, without passing on the power or right to condemn and a second set of Preliminary Objections are filed to the Amended Complaint which the Court dismissed because they were not filed with the original Objections and this was affirmed by the Supreme Court in a *Per Curiam* Opinion, are the condemnees deprived of their right of due process of law by the failure of the Court to act on the Preliminary Objections raising the question of the power and right to condemn?

UNDERLYING QUESTION

Should a *Per Curiam* Opinion affirming the dismissal of Preliminary Objections filed to the Amended Declaration because they have not been filed with the original Objections, be construed as being *res adjudicata* of the original objections which were not disposed of in the Court Below, by which construction, the condemnees were deprived of their right to be heard and have adjudicated issues raised contrary to the right provided by the Federal and State Constitutions and the due process clause of each?

In the construing the effect of a *Per Curiam* affirmance by the Supreme Court, should it be construed so as to give

the condemnees a right to be heard, thus squaring with the Constitutional provisions or should it be construed so as to deprive the condemnees of their Constitutional right of due process of law?

STATEMENT OF FACTS

A Declaration of Taking was filed for the three parcels of ground under date of September 5, 1957, taking the surface only. Within thirty days of service, seven Preliminary Objections were filed. As to late service, the Preliminary Objection was dismissed as prejudice had not been shown. As to the taking of the surface when the Resolution authorized the taking of a fee simple title, the Preliminary Objections were sustained and the Declaration dismissed unless an Amended Declaration of Taking be filed within twenty days, which was done. All the other Preliminary Objections were undisposed of. The sixth Preliminary Objection, to which an Answer was filed denying the averments, was not disposed of in any way and remains undisposed of to this day.

An Amended Complaint was filed February 27, 1968, to which Preliminary Objections were filed March 28, 1968, and by leave of Court Preliminary Objections *nunc pro tunc* were filed April 17, 1968. The Court dismissed these second Preliminary Objections and the Preliminary Objections filed *nunc pro tunc* under Sec. 406(c) of the Eminent Domain Code which provides:

> "All Preliminary Objections shall be raised at one time, in one pleading. They may be inconsistent."

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

On appeal this was affirmed by a *Per Curiam* Opinion found in 433 Pa. 599.

The condemnees presented a Petition to the Court requesting that the original Preliminary Objections not disposed of be adjudicated by the Court, which Petition was refused and an appeal was taken to the Commonwealth Court and which Opinion was affirmed by a majority of the Court and Judge Mencer wrote a Dissenting Opinion joined therein by Judge Crumlish.

It is from this Opinion that the Petitioners now seek the right to appeal on the basis that all their original Preliminary Objections have never been disposed of by the trial Court, contrary to the mandate of the Eminent Domain Code.

APPELLANTS' CONTENTIONS

That the condemnees have been deprived of their property without due process of law contrary to both the Federal and State Constitutions and contrary to the Eminent Domain Code.

Section 406(e) of the Eminent Domain Code provides (26 P. S. 1-406(e)):

> "The Court shall determine promptly all Preliminary Objections and make such preliminary and final orders and decrees as justice shall require."

The effect of dismissing the Preliminary Objections affirmed by this Court was limited only to the second set of Preliminary Objections filed to the Amended Declaration

for the reason that Sec. 406(c) provides that all Preliminary Objections must be filed at one time. This dismissal as affirmed had no effect and did not rule on the Court's duty to dispose of the original Objections challenging the condemnor's power to appropriate. The most basic question raised in the original Preliminary Objections has never to this day been disposed of by the trial Court.

The construction placed on the former adjudication by the majority Opinion of the Commonwealth Court deprives the condemnees of their Constitutional right under the due process clause.

AUTHORITIES

The Eminent Domain Code of 1964 (26 P. S. 1-406(e)) requires the Court to promptly dispose of *ALL* Preliminary Objections.

The Due Process Clause of our Pennsylvania Constitution, Article 1, Sec. 9 provides:

> "nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."

Article 1, Sec. 10 provides:

> "nor shall private property be taken or applied to public use without authority of law and without just compensation being first made or secured."

The Eminent Domain Code fixes the law of our land and the authority of the law and when the Court is given a mandatory duty to dispose of all Preliminary Objections and he has failed so to do, the condemnees have not been accorded due process of law.

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

Due Process has to do with denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with justice but with their exercise.

Daniel Webster in the *Dartmouth College* case, 4 Wheat. (U. S.) 518, defined due process as meaning:

> "A law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

In the case of *McGuire vs. Sadler,* 337 Fed. 2d 902, the Court said in determining certain procedural improprieties the hearing before the Commissioner had deprived the plaintiff of a fair opportunity to protect his property as follows on Page 906:

> "If such procedural shortcomings are found to have existed and if indeed they deprived the plaintiff of a fair and adequate hearing, these findings would seem sufficient for a showing of a Fourteenth Amendment violation."

Due Process based on Sections 9 and 10 of Article I of the Pennsylvania Constitution and like provisions in the Fifth and Fourteenth Amendments to the Federal Constitution under our Eminent Domain Code of 1964 requires an opportunity to present testimony and be heard and when the Courts fail in this, the condemnees are deprived of due process of law.

The case of *Hilliard et al. vs. Commonwealth of Pennsylvania,* 308 Fed. Sup. 756, only held that the affirmance of the lower Court in the *Per Curiam* Opinion of this Court reported in 433 Pa. 599 was only *res adjudicata* as to the

right to file a second set of Preliminary Objections when the Declaration had been amended and there is no *res adjudicata* as to the first Preliminary Objections which have never been ruled upon contrary to the Eminent Domain Code and, hence, were not before the Court on appeal. In this case, Senior District Judge Gourley found there were three Constitutional questions raised and one of them appeared to him to be substantial. The three questions are outlined in the Dissenting Opinion of Judge Mencer of the Commonwealth Court, joined therein by Judge Crumlish and attached hereto.

In the case of *Szekely vs. Abilene Flour Mills Co.*, 211 Pa. Super. 442; 237 A. 2d 242, issues of fact were raised and not resolved by opposing affidavits and on appeal the Court said:

> "It is our belief, however, that both parties misconceived the nature of the fact finding process of Preliminary Objections."

And the case was remanded for the trial Court to proceed to a hearing on Preliminary Objections.

It is, therefore, respectfully submitted that an appeal be allowed and after hearing the case be remanded to the trial Court to determine the original Preliminary Objections never acted upon by any Court.

RECORD

The records attached hereto and made a part hereof are as follows:

1. Dissenting Opinion of Judge Mencer joined therein by Judge Crumlish of the Commonwealth Court, Exhibit A.

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

2. Majority Opinion of the Commonwealth Court written by Judge Wilkinson, Exhibit B.

3. Three copies of the Record, Appellants' and Appellee's Briefs submitted to the Commonwealth Court.

4. Opinion of the Honorable George P. Kiester, President Judge of the Common Pleas Court of Butler County appealed from to the Commonwealth Court, Exhibit C.

5. Preliminary Objections to the Amended Declaration of Taking, Exhibit D.

6. Opinion of Judge John Q. Stranahan, Specially Presiding from the 35th Judicial District, dismissing the Preliminary Objections to the Amended Declaration, Exhibit E.

7. The affirmance of this dismissal is reported by *Per Curiam* Opinion of this Court in 433 Pa. 599.

8. Original Preliminary Objections to Declaration of Taking, Exhibit F.

9. Opinion by the Honorable George P. Kiester, President Judge of the Common Pleas Court of Butler County and Order dated February 13, 1968, showing all Preliminary Objections were not disposed of, Exhibit G.

It is respectfully requested that an appeal be allowed.

McCANDLESS, CHEW & KRIZNER,

By LEE C. McCANDLESS,
Attorneys for Petitioners.

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

Answer to Petition for Leave to Appeal

Filed December 30, 1971.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,

vs.

CARL HILLIARD,

Appellant.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,

vs.

PRESSLEY L. HILLIARD,

Appellant.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA GAME COMMISSION,

vs.

EDWARD F. BOOKSER and RUTH R. BOOKSER,
his wife,

Appellants.

To the Honorables, the Judges of said Court:

The Appellees, the Commonwealth of Pennsylvania, Pennsylvania Game Commission, file this Answer to the Petition for Leave to Appeal, previously filed by Carl

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

Hilliard, Pressley L. Hilliard, and Edward F. Bookser and Ruth R. Bookser, his wife, to the Order of the Commonwealth Court of Pennsylvania dated December 9, 1971.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

Where the Supreme Court of Pennsylvania, in a *Per Curiam* Decision (433 Pa. 509), has already decided the question of the proper filing of constitutional objections to the Declarations of Taking filed by the Commonwealth of Pennsylvania, and affirmed the Order of the lower court which held that the condemnees could file constitutional objections only at certain specified times, as set forth in the Eminent Domain Code, can the condemnees attempt to relitigate the entire question of constitutionality of the take, by claiming that the appeal from the Award of Viewers raises the question of constitutionality, under Sections 515 and 517 of the Eminent Domain Code?

COUNTER-HISTORY OF THE CASE

In 1967 the Commonwealth filed a Declaration of Taking, to which Preliminary Objections, and Answer thereto, were filed. The court dismissed the original Declaration of Taking, unless an Amendment was filed within twenty days, which Amendment was promptly and timely filed. Additional Preliminary Objections were filed to the Amendment, Answer filed, and the court dismissed these Objections as being untimely filed, in violation of Section 406 of the Eminent Domain Code, 26 P. S. 1-406. From this adjudication an appeal was taken to the Pennsylvania Supreme Court, which affirmed (433 Pa. 599).

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

Viewers were appointed, heard the case, and made an award, from which condemnees took an appeal to court. Before the award was made by the Board of View, condemnees brought an Injunction Suit in the Federal District Court for the Western District of Pennsylvania, attempting to enjoin the Commonwealth from proceeding. That court, Judge Gourley, refused the Injunction on the grounds that the matter was *res adjudicata,* since no Writ of Certiorari was taken from the Pennsylvania Supreme Court to the United States Supreme Court (308 Fed. Supp. 756). An appeal was taken to the Third Circuit Court of Appeals, which affirmed the Commonwealth's right to proceed (Feb. 4, 1971, in the case of *Carl Hilliard, et al. vs. Commonwealth of Pennsylvania, et al.,* Nos. 18,766 thru 18,768).

Condemnees then filed a Petition to permit condemnees to present testimony on the power and right of the Commission to condemn preliminary to the determination of damages. Answer was filed. The Commonwealth thereupon filed a Praecipe for Writ of Possession pursuant to 26 P. S. 1-407. Answer was filed. The Court of Common Pleas of Butler County filed Opinion dated June 7, 1971, and Order, denying the Petition to Take Testimony, and granting the Writ of Possession. From this Order the condemnees appealed to the Commonwealth Court, which affirmed the lower court, by Opinion dated December 9, 1971. Condemnees have petitioned for an appeal to this Court.

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

APPELLEE'S CONTENTIONS

That this case has been decided by the Pennsylvania Supreme Court, which affirmed the Opinion of Judge Stranahan, *Per Curiam* (433 Pa. 599), and that this decision conclusively and permanently determines appellee's rights as to contesting constitutionality. That decision is *res judicata,* and stands for the proposition that the time for attacking constitutionality of the take is now past. Sections 515 and/or 517 of the Eminent Domain Code do not grant to condemnees a second opportunity for contesting constitutionality of the take, but refer to other matters that will or could arise at trial of the issues, concerning damages to be awarded.

Condemnees have perfect protection within the due process clause of both federal and state constitutions, in that they are afforded an opportunity to contest constitutionality of the take. Such right, however, is not assertable at any time, but only within provisions contained in the Eminent Domain Code. The previous decision of this Court reviewed this matter, and affirmed the Opinion of the Court below. This is *res judicata.* The case should now be ready for trial before the Court of Common Pleas of Butler County, on the issues of damages to be awarded.

AUTHORITIES

The Eminent Domain Code of 1964 (26 P. S. 1-406), which allows condemnees to attack constitutionality of the take, and set procedural rules how to do.

Exhibit L—Petition for Leave to Appeal to Supreme Court of Pennsylvania & Answer.

The decision of this Court in *Commonwealth of Pennsylvania, Pennsylvania Game Commission, vs. Carl Hilliard, et al.*, 433 Pa. 599 (1969).

It is respectfully requested that the requested appeal be disallowed.

ROBERT J. STOCK,
ROBERT J. STOCK,
Attorney for Condemnor.

EXHIBIT M

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Patrick N. Bolsinger
Prothonotary

Pittsburgh, Pa.
15219

Helen D. Steele
Deputy Prothonotary

May 2, 1972

Lee C. McCandless, Esquire
McCandless, Chew & Krizner
308 Mellon Bank Building
Butler, Pa. 16001

In Re: Com. of Pennsylvania, Pennsylvania Game Commission v. Carl Hilliard, *et al.*
No. 123 Allocatur Docket

Dear Mr. McCandless:

This is to advise you that the Court has entered the following Order on the Petition for leave to appeal from the decision of the Commonwealth Court at Nos. 454, 455, 456 C. D. 1971, in the above case:

"April 28, 1972
PETITION DENIED.
PER CURIAM"

Very truly yours,

HELEN D. STEELE
Deputy Prothonotary

ig

cc: Robert J. Stock, Esquire
Special Counsel
Pennsylvania Game Commission